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IN THE

Supreme Court of the United States

October Term, 1978

No. 78 - 560

BLYTH, EASTMAN DILLON & CO., INC.
and MICHAEL STOTT,

Petitioners,

—against—

DAVID E. ROLF,

Respondent,

—and—

AKIYOSHI YAMADA,

Defendant.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF NEW YORK STOCK EXCHANGE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

New York Stock Exchange, Inc. (the "Exchange") moves pursuant to Rule 42 of this Court for leave to file the attached brief amicus curiae in support of the petition.

The Exchange is a national securities exchange and a self-regulatory organization under the Securities Exchange Act of 1934 with supervisory responsibilities over the conduct of its members, including enforcement of Section 10(b) of the Exchange Act and Rule 10b-5. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). The Exchange is thus necessarily interested in the applicable standards for imposition of principal and aider and abettor liability under Section 10(b) and Rule 10b-5.

Because the panel decision below involves questions of federal law which have not been considered by this Court, and because the decision appears to conflict with the opinion of this Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), as well as with cases decided by other courts of appeal, the Exchange has an interest in this Court's review and clarification of this important area of the federal securities laws.

The Court of Appeals permitted the Exchange to file a brief amicus curiae in support of defendants' motion for rehearing with suggestion for rehearing in banc. In banc review was denied, with Judges Mansfield, Mulligan, Gurfein and Van Graafeiland dissenting.

Consent to file a brief amicus curiae with this Court has been sought and obtained from petitioners but has been refused by respondent. The Exchange therefore requests leave to file the attached brief amicus curiae in support of the petition.

October 31, 1978

Respectfully submitted,

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BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC. IN SUPPORT OF PETITION FOR CERTIORARI

Interest of New York Stock Exchange, Inc.

New York Stock Exchange, Inc. (the "Exchange") is a national securities exchange registered with the Securities and

Exchange Commission pursuant to Section 6 of the Securities Exchange Act of 1934. There are 1366 members of the Exchange, many of whom are associated with one of 483 member organizations of the Exchange. Because members and member organizations of the Exchange must comply (and may be subjected to civil suit for failure to comply) with the fraud provisions of the federal securities laws in respect of their customers, and customers of their employees, Exchange members are necessarily interested in whether and under what circumstances a party will be held secondarily liable as a result of knowledge of, or involvement in, the improper activities of others.

The Exchange, as a self-regulatory organization under the Exchange Act, has enforcement and disciplinary responsibilities over the conduct of its members. The Exchange is required by Section 6(b)(5) of the Exchange Act to make rules designed to prevent fraudulent and manipulative acts and practices, and it is further required by Section 6(b)(6) of the Exchange Act to discipline members and persons associated with members who have violated the Exchange Act, the rules and regulations thereunder, and the Exchange's own Constitution and Rules. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). As a self-regulatory organization charged with enforcing Section 10(b) and Rule 10b-5, the Exchange is necessarily interested in the circumstances under which proceedings should be brought as a result of knowledge of, or involvement in, the improper activities of others.

Argument

The petition should be granted because the panel decision below has decided a number of important questions of federal law which have not been, but should be, decided by this Court, and for the further reason that the panel decision appears to conflict with decisions of this Court and those of other courts of appeal, and thus renders uncertain the applicable standards under Section 10(b) and Rule 10b-5.

In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-92 n.7 (1976), this Court found it unnecessary to decide whether civil liability for aiding and abetting is appropriate under Section 10(b) and Rule 10b-5, and accordingly found it unnecessary to consider what are the elements of such a cause of action. The panel decision below holds that Section 10(b) and Rule 10b-5 permit the imposition of aiding and abetting liability. 570 F.2d at 44; A.*9. That holding and the specific test formulated by the panel decision are matters of significant and immediate importance which should be resolved by this Court so that those who are subject to the federal securities laws, and those who are responsible for enforcing them, know precisely what these important standards are.

In *Hochfelder, supra* at 193-194 n.12, this Court also found it unnecessary to decide whether reckless behavior satisfies the scienter requirement for civil liability under Section 10(b) and Rule 10b-5. In this case, the panel decision holds that recklessness is sufficient. As pointed out in the petition (at 13-18), this holding of the panel decision conflicts with the decisions of other courts of appeal which have ruled that the aider and abettor must have actual knowledge of the fraud perpetrated by the primary wrongdoer.

Moreover, the panel decision appears based, in part, upon a determination that the purchase of unsuitable securities by an investment advisor for his customer, without more, can amount to fraud within the meaning of Section 10(b) and Rule 10b-5, and that another person may be held secondarily liable for aiding and abetting such fraud by expressing confidence in the investment advisor, who at that time had a concededly excellent reputation. If the purchase of unsuitable securities for a customer is fraud, and if assisting in the purchase of unsuitable securities is aiding and abetting fraud, then it should be this Court that announces such an extension in the scope of liability under Section 10(b) and Rule 10b-5.

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* "A." refers to the Appendix to the Petition

The panel decision below was severely criticized by Judge Mansfield in his dissent:

> "The majority views Yamada's investment of the account in unsuitable securities as fraud in and of itself and Stott's state of mind as recklessness amounting to a deliberate intent to deceive. All of this is too much for me to accept. The majority not only patches together watered-down notions of fraud and scienter in arriving at a result indistinguishable in any significant respect from that reversed by the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), but also overlooks findings below and undisputed evidence that foreclose Rule 10b-5 liability." 570 F.2d at 50; A.23-24.

Judge Mansfield further notes that the majority fails to identify the fraud Stott is alleged to have aided and abetted, and that in respect to the purchase of unsuitable securities, the majority confuses the common law duties of a fiduciary with the more limited prohibitions of Section 10(b) and Rule 10b-5. 570 F.2d at 50-51; A.24-25. Judge Mansfield contends that the majority erred in holding that Stott's assurances as to Yamada's competence, despite doubts about some of the investments, established recklessness, and argues that at most there was a failure to inquire which is not, without more, the equivalent of scienter as defined by this Court in *Hochfelder*. 570 F.2d at 51; A.25-26. Judge Mansfield concludes that the facts do not demonstrate that Stott participated in any fraud with the required scienter, and barely make out a case of negligence against Stott. 570 F.2d at 52; A.27-29.

The concerns articulated by Judge Mansfield are equally concerns of the Exchange, its members, and their employees.

Conclusion

The petition should be granted so that this Court can clarify important questions of fraud liability under the federal securities laws.

October 31, 1978

Respectfully submitted,

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